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No. 03-1030

In the Supreme Court of the United States

JOEL CUNIGAN, MARK WILES, ASST. CHIEF
WAYNE GRANT, SAM MANLEY, JOHN TELEK,
Petitioners,

v.

ALI SHAMAEIZADEH, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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I. THE SIXTH CIRCUIT REJECTED THE RULINGS OF OTHER COURTS AND REQUIRED CONSENT TO BE EXPRESSED AND PARTICULARIZED.

The Sixth Circuit's rule for consent searches created in this case rejects the totality of the circumstances approach and is in conflict with rulings of this Court and other sister circuits. The Court below held that police officers are required to obtain express consent upon a search, creating a rule that ignores the totality of the circumstances in order to determine consent.

The facts of this case have been well developed through the four published opinions of the Court below. There is no disputed material fact that Respondent's live-in girlfriend escorted the officers in their walk-throughs of the house. (Appndx, at 7a). Respondent even acknowledges so in his brief ("[t]he problem with their argument is not with Schmitt giving continued assistance. She did"). Respondent's Brief in opposition to Certiorari, at p. 5-6. The issues of continuing and implied consent are therefore critical to this action as the officers relied upon Schmitt's actions in their continued presence. This case certainly then, contrary to Respondent's assertion, is not a waste of this Court's time.

As cited in Petitioner's prior brief, the Supreme Court of Alaska stated in Phillips v. State, 625 P.2d 816 (Alaska 1980), "there is relatively little authority on this question but what authority there is supports our view [on continuing consent]." Id., 625 P.2d at 818. In the last nearly 25 years, what legal authority exists reveals a continuing consent doctrine that places the burden on the individual to object or revoke consent once given. As discussed below, this approach is consistent with judging consent by the totality of the circumstances and allowing for implied consent.

Respondent boldly claims "there is nothing in the Sixth Circuit opinion that creates any [per se] rule concerning the scope of a search." However, on Appdx. page 18a, the Sixth Circuit applies the same "particularity requirement" required of search warrants to the scope of a consensual search and relies upon Walter v. U.S., 447 U.S. 649, 656 (1980) for this proposition. Walter does not stand for such a proposition and, in fact, is not even a consent case. More importantly, Walter states a non-controversial proposition that the scope of a search - whether by consent or by the issuance of a valid search warrant - is limited by the terms of its authorization. Walter, 447 U.S. at 656 (Appdx. at 18a). But, the Court below went further and erroneously stretched the meaning of this language from Walter holding that "the Fourth Amendment 'requires that the scope of every authorized search be ***particularly described***.'" (Appndx. at 18a). The Sixth Circuit, therefore, has expressly created a rule that consent to a search must be "particularly described," just as a search warrant must be described.

The Sixth Circuit further reasoned that Petitioners "do not assert that Schmitt ***explicitly consented*** to the second or third search. In fact, they admit that they did not ***expressly request her consent*** when additional officers arrived to search the residence and that they do not recall Schmitt ***expressly articulating any such consent*** of her own volition." (Appndx. at 20a). The Sixth Circuit thus has now established what is in effect a *per se* rule that requires officers to obtain additional consent for subsequent searches that are close in time and purpose and *to request express consent* in every circumstance to verify that implied consent exists or continues.

This approach rejects well-established law from this Court and other circuits that implied consent may be granted and is to be judged by the totality of the circumstances. Florida v.

Bostick, 501 U.S. 429, 439 (1991); United States v. Drayton, 536 U.S. 194, 201 (2002); United States v. Hylton, 349 F.3d 781 (4th Cir. 2003); United States v. Barahona, 990 F.2d 412, 418 (8th Cir. 1993); United States v. Griffin, 530 F.2d 739, 742 (7th Cir. 1976); United States v. Chaidez, 996 F.2d 377, 382 (8th Cir. 1990)(cooperation evidences voluntary consent); U.S. v. Sanchez-Valderuten, 11 F.3d 985, 991 (10th Cir. 1993)(defendant's conduct while search taking place indicates he freely consented to the search). Of course, these cases also make clear that consent can be demonstrated not just by words but also by conduct. Accordingly, the Sixth Circuit's rule that consent be "expressed" and "articulated with particularity" conflicts with all other established law.

The concept of "particularity" with regard to a search warrant means that the scope, place and extent of the search must be "expressly articulated" and written down on the face of the warrant, or otherwise the search is invalid. Blanket consent as an exception to the search warrant requirement is not, however, inappropriate at all. As Drayton, supra, demonstrates, law enforcement officers often face circumstances where no express consent will be particularized. When, in response to a request for consent to search, one subject said "go ahead" and lifted his bag, while the other said nothing but lifted his hands, the consent for the latter was not "expressly particularized" (and thus unlawful according to the Sixth Circuit) but yet held lawful by this Court. Drayton, 536 U.S. at 198-200. Both were deemed consensual searches when viewed under the "totality of the circumstances" test. Id., at 201. Their consent was anything but expressly articulated with particularity. Indeed, it was, in effect, blanket consent to search their belongings.

The fact that much of the relevant case law cited relates to searches of automobiles or of the persons rather than of a dwelling is inconclusive. Consent for purposes of the

reasonableness requirements of the Fourth Amendment is not dependent upon the item to be searched or seized; much as the requirements of probable cause for search or the particularity requirements for a search warrant do not differ based upon the item to be searched or seized.

This decision by the Sixth Circuit will have devastating effects upon law enforcement. The Court's ruling will prohibit police from the normal practice of having back-up assistance. This Court has never required that each officer entering the scene must independently have sufficient cause to act. Moreover, no clearly established law requires each individual officer to obtain separate consent to search so long as the consent is deemed continuing. Under such circumstances, back-up officers arriving for the safety of all concerned will be prohibited from assisting fellow officers, unless an exigency exists. Such is the effect of the Sixth Circuit's ruling.

Moreover, this new rule of the Sixth Circuit will create havoc for law enforcement throughout Kentucky, Michigan, Ohio and Tennessee and effectively end search by consent. The crippling effect upon the major metropolitan police forces in Detroit, Nashville, Cincinnati, Louisville and Memphis of this rule is untenable. For example, a yearly study by the Michigan State Police for 2000 indicates that its State Troopers conducted 564,672 traffic stops that year. Of that number, 27,800 resulted in searches of the automobile. Twenty-nine percent, 8,122, of those searches were based upon consent. See "Michigan State Police - 2000 Traffic Enforcement Summary" *http://www.michigan.gov/msp/0,1607,7-123-1645_3501_4627-11838–,00.html*. According to the Sixth Circuit, those consent searches will only be valid if the driver gave express particularized consent.

II. THE DELAYED ACCRUAL RULE OF HECK V. HUMPHREY DOES NOT APPLY TO RESPONDENT'S CLAIM OF ILLEGAL SEIZURE.

There is no material dispute in this case that jewelry and personal papers were seized from Respondent's home. However, it is likewise undisputed that those items were returned to him well before the dismissal of the criminal charges. (Plaintiff's Depo., at p.115). The jewelry was returned "a couple of months" after they were seized (Plaintiff's Depo., at p. 115), i.e., the later months of 1994. As for the papers seized, these items consisted of social security cards, each with different social security numbers. Plaintiff also claims bank account and brokerage account papers were seized as well. Plaintiff claims these documents were returned to him"at least between nine months to a year" (Plaintiff's Depo., at p.116) after they were seized, i.e., mid-1995. The criminal charges were dismissed on April 9, 1996, and the Complaint in this matter was filed April 8, 1997, well after one year from the return of the items and thus beyond the statute of limitations.

The Sixth Circuit below held that the plain view doctrine did not apply to seizure of these items because there was no immediately incriminating nature. Yet, the Court held Respondent's claims were not barred by the applicable statute of limitations because "it would have been impossible to conclude during the course of Shamaeizadeh's criminal proceeding that the seized jewelry and papers would not have been used as evidence of the alleged illegality." App., *infra*, 35a, fn.6.

In Wilson v. Garcia, 471 U.S. 261 (1985), this Court accepted certiorari to determine the applicable statute of limitations in Section 1983 actions. Reasons supporting review were well founded as "[f]ew areas of the law stand in greater

need of firmly defined, easily applied rules than does the subject of periods of limitations." Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (REHNQUIST, J., dissenting). "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." Wilson, 471 U.S. at 266.

Like calculating limitations periods, accrual of causes of action deserve just as much "firmly defined, easily applied rules." The Court below applied a delayed accrual rule for a cause of action relating to an illegal search and seizure, thus broadening the rule's scope for any act of the police in the execution of the search, even those unrelated to any criminal proceeding based upon the Court's "impossibility" standard. This ruling is in great conflict among the circuits.

This Court held in Heck v. Humphrey, 512 U.S. 477, 487 (1994) (italics in original), that "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." In footnoting this point, this Court wrote that:

> [f]or example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery,...and especially harmless error,...such a §1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Id. 512 U.S. at 487 n.7 (citations omitted).

As the Court below previously observed, this Heck footnote has been "interpreted in two different ways." Shamaeizadeh v. Cunigan, 182 F.3d 391, 395 (1999). The Sixth Circuit reads it as "clearly rejecting the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under §1983." Id., at 396, citing Schilling v. White, 58 F.3d 1081 (6th Cir. 1995). Now, the Sixth Circuit extends its minority rule to a claim of unlawful seizure, even though the items seized were returned before the criminal charges were dismissed and were unrelated to the underlying criminal charges. App., *infra*, 35a, fn 6.

In Harvey v. Waldron, 210 F.3d 1008 (9th Cir. 2000), the Ninth Circuit joined the Sixth Circuit's reasoning. The Harvey Court noted that this Court never addressed the applicability of Heck to §1983 claims alleging damages attributable to an allegedly illegal search and seizure of property and that "**[t]here is a split in the circuits as to how Heck's footnote seven should be interpreted.**" Harvey, 210 F.3d at 1015 (emphasis added). In Harvey, old gambling machines were seized and the subject was charged with possession of those items which was prohibited at the time. Id., at 1010. The Ninth Circuit joined the Second, Fifth and Sixth Circuits finding that a cause of action for unlawful search and seizure does not accrue until the criminal charges are dismissed. Id., at 1015 ("a §1983 action alleging search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction overturned").

The Second Circuit has adopted a similar approach. See Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999). In Covington, the plaintiff brought a §1983 claim alleging an unconstitutional false arrest after criminal charges were dismissed against him. Id. at 119. The Second Circuit held

that the determining factor as to when Covington's cause of action accrued depended upon whether "a judgment in Covington's favor on the false arrest claim would have undermined the validity of any potential conviction in the criminal proceedings against him." Id. If so, the cause of action would not accrue until after termination of the criminal proceedings.

The Fifth Circuit Court of Appeals follows a similar approach. See Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995). In Mackey, the plaintiff brought an unreasonable search and seizure claim which the district court treated as an attack on his arrest. Id. at 745-46. The Court held "...if he is convicted and evidence is presented...which is a...product of...his arrests, then his §1983 damage claims challenging the validity of his arrests would appear to undermine the validity of his conviction" and hence be barred by Heck. Id. at 746.

On the other hand, four other circuit courts of appeals (the Seventh, Eighth, Tenth and Eleventh) hold that Heck's footnote 7 creates a general exception to Heck for a §1983 Fourth Amendment unreasonable search and seizure claim. See, e.g., Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (stating "Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so *in all cases* these claims can go forward") (italics added).

The Seventh Circuit interprets Heck in a brightline "general exception" fashion, holding that in *all* Fourth Amendment claims of unlawful search or arrest, Heck has no application. See, e.g., Copus, 151 F.3d at 648; Gonzalez v. Entress, 133 F.3d 551, 553-54 (7th Cir. 1998); Perez v. Sifel, 57 F.3d 503 (7th Cir. 1995) (holding "claims relating to an illegal search and improper arrest may not be [Heck-]barred, as neither claim would necessarily undermine the validity of the conviction").

In Gonzalez, supra, suit was not commenced until well beyond the expiration of limitations calculated from the date of the search and arrest. Judge Easterbrook thoroughly explains the Seventh Circuit's approach to Fourth Amendment claims, expressly recognizing the conflict with the Sixth Circuit, but nevertheless continuing to interpret Heck's footnote 7 to mean "a claim based on an unlawful search or arrest may be brought immediately[] because a violation of the fourth amendment does not necessarily impugn the validity of a conviction." Gonzalez, 133 F.3d at 553. In holding Gonzalez's claim time-barred, the Court stated "a claim asserting a violation of the fourth amendment necessarily 'accrues' at the time of the unlawful search or seizure, as we have held several times." Id. The Court reasoned "that a search can be unlawful but the conviction entirely proper, or the reverse, and that *some injury* from a violation of the fourth amendment is unrelated to the conviction." Id. at 554 (italics added).

The Eighth Circuit Court of Appeals aligned with the Seventh Circuit (Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996). The Simmons Court held that the Fifth Amendment claims accrued at the time of the alleged violations, and that accrual of claims was not dependent upon the favorable outcome of criminal charges. Applying Heck's footnote 7, the Court stated: "harmless error analysis is applicable to the admission at trial of coerced confessions, [and therefore] judgment in favor of Simmons on this §1983 action challenging his confession will not necessarily demonstrate the invalidity of his conviction." Id. at 1095.

The Tenth and Eleventh Circuits have followed suit. See, e.g., Crow v. Penry, 102 F.3d 1086 (10th Cir. 1996) (dismissing a federal inmate's claim that his probation officer unlawfully obtained search and arrest warrants); Datz v. Kilgore, 51 F.3d 252, 253, n.1 (11th Cir. 1995) (holding that Heck did not bar a section 1983 unlawful search claim because

the conviction might still be valid because of such doctrines as inevitable discovery, independent source and harmless error).

Footnote 7 of the Heck case has been interpreted inconsistently between various circuit courts of appeals. There exists a clear-cut, direct conflict between the Second, Fifth, Sixth and Ninth Circuits with the Seventh, Eighth, Tenth and Eleventh Circuits in their respective approaches and holdings regarding accrual of §1983 claims. In fact, most of these courts recognize their split. The differences in opinions have existed since just after Heck was handed down. Courts addressing this issue for the first time line up on one side or the other of the conflict.

CONCLUSION

This case presents two critical issues of importance: the implied/continuing consent doctrine and the accrual of causes of action under Heck. Both areas represent recognized splits in the Circuits and the facts are very well developed in the multiple opinions below with no dispute of material fact. The issues are of extremely high importance given the number of consent-based searches, the non-uniform application of the Heck rule, and the growing split among the Circuits. Just as was warranted in Wilson v. Garcia, for the sake of uniformity, certainty and predictability in the law, especially as the law pertains to the proper calculation of claim accrual and limitations, this Court should intercede and resolve this conflict.

Respectfully Submitted,

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